IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 149.

WILLIAM McCOACH, Collector of Internal Revenue, Petitioner,

v.

DUNDAS F. PRATT, FREDERICK A. DREER, S. HENRY NORRIS and WILLIAM LORE, Executors of the Last Will and Testament of Ferdinand J. Dreer, Deceased, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

Statement.

Respondents obtained judgment in the United States Circuit Court for the Eastern District of Pennsylvania against the Petitioner, as Collector of Internal Revenue, in the sum

of $1,795.15, (*R.* 30) on account of a payment exacted by the latter under color of the legacy tax provisions contained in Sections 29, 30 and 31 of the Act of June 13, 1898, (30 *Stat.* 448) and amendments (31 *Stat.* 946; 32 *Stat.* 406).

This judgment was affirmed by the Circuit Court of Appeals (*R.* 33-4) and certiorari was issued by this Court to bring up the Record for review.

Ferdinand J. Dreer, at that time domiciled in Philadelphia, Pennsylvania, died, testate, on May 24, 1902 (*R.* 5).

By his will, which was duly probated and of which respondents were the executors, he provided, among others, the following legacies—

1. To each of his sons, Frederick A. Dreer and Ferdinand J. Dreer, Jr., he left $10,000 "to be paid to them by my executors within one year after my decease" (*R.* 17) and a life annuity of $5,000 to be paid from the income "when and as received" of his residuary estate, both real and personal, which was placed in trust for that and other purposes, subject to the following limitation—

> "without the said annuity or any part thereof being in any manner or way liable for or subject to their debts, contracts or engagements and so that neither of my said sons shall assign or otherwise dispose of the same by way of charge or in the way of anticipation." (*R.* 20-21)

2. To his grandson, Edwin Greble Dreer, he left $5,000 "to be paid to him within one year after my decease" (*R.* 19) and a life annuity of $2,500 "payable quarterly the first payment thereof to be made at the expiration of three months after my decease," and limited as follows:

> "without the said annuity or any part thereof being in any manner liable or subject to his debts, contracts or engagements and so that he shall not assign or otherwise dispose of the same by way of charge or in the way of anticipation." (*R.* 19)

3. To his grand-daughter, Abigail Dickinson Dreer, he left $5,000 "to be paid to her within one year after my decease," (*R.* 19) and a life annuity of $2,000, payments to begin at the same time and the rights of the annuitant limited precisely as in the case of the annuity left to Edwin Greble Dreer (*R.* 19).

The amount of the residuary personal estate was not ascertained nor was any such residue paid to the trustees prior to July 1, 1902 (*R.* 9).

About May 29, 1903, the respondents filed with the Collector of Internal Revenue a schedule of legacies arising from the personalty of the estate (*R.* 5) and on July 1, 1903, that is to say just one year after the repeal of Section 29 of the Act of June 13, 1898, the Commissioner of Internal Revenue assessed (*R.* 6, 9) the foregoing legacies, as follows:

1. The legacies to Frederick A. Dreer were given a valuation of $20,975.68, of which $10,975.68 was the valuation placed upon the annuity; the tax, calculated on this valuation, was $157.32 (*R.* 7).

2. The legacies to Ferdinand J. Dreer, Jr., were given a valuation of $25,264.82, of which $15,264.82 was the valuation placed upon the annuity; the tax, calculated on this valuation, was $284.23 (*R.* 7).

3. The legacies to Edwin Greble Dreer were given a valuation of $43,293.05, of which $38,293.05 was the valuation placed upon the annuity; the tax, calculated on this valuation, was $487.07 (*R.* 7).

4. The legacies to Abigail D. Dreer were given a valuation of $38,753.52, of which $33,753.52 was the valuation placed upon the annuity; the tax, calculated on this valuation, was $435.98 (*R.* 7).

The sums claimed, as above, by the Collector, aggregating $1,364.60 were paid, under protest, on July 13, 1903 (*R.* 6-7). Claim for refund of the tax was made and filed with the Petitioner within the statutory period (*R.* 7, 9-14) and on its rejection this proceeding was begun. The judgment

below was for the sum named and $430.55 interest, $1,795.15 in all (*R.* 30).

Respondents will rely particularly upon the following facts, indicated by the foregoing summary, to which especial attention is respectfully invited—

1. Nothing was payable on account of the annuities to Edwin Greble Dreer and Abigail D. Dreer until three months after their testator's death, that is until August 24, 1902, after the repeal of the tax (*R.* 19).

2. The annuities to Frederick A. Dreer and Ferdinand J. Dreer, Jr., were charged upon the residuary ~~personal~~ estate, and no residue of personal estate was or could have been ascertained or paid to the trustees prior to July 1, 1902 (*R.* 9).

3. Exclusive of the annuities, no legatee received a legacy of more than $10,000 (*R.* 17-24; *Brief for Petitioner, p.* 7).

4. The pretended assessment was made on July 1, 1903, one year after the tax was repealed (*R.* 9).

ARGUMENT.

On the foregoing facts it will be argued that:

First. Section 29 *of the Act of June* 13, 1898 (30 *Stat.* 448), *being repealed as of July* 1, 1902, *by the Act of April* 12, 1902 (32 *Stat.* 97), *did not grant to the United States any right to any tax on any of these legacies.*

Second. No tax under the Act of June 13, 1898, *could be imposed, or any individual liability therefor arise, except as the consequence of a lawful assessment and no assessment made after July* 1, 1902, *could be lawful.*

Third. The assessment and collection in this case were prohibited by Section 3 *of the Act of June* 27, 1902 (32 *Stat.* 406).

Fourth. By adopting the construction now contended for by the Petitioner, the Treasury Department contrived to collect a greater amount on account of legacy taxes during the year after the repeal than during any other period of equal length. Congress cannot have intended this result.

Fifth. The judgment below should be affirmed in accordance with the rule stare decisis.

The first three propositions stated are separate and independent—any one of them is, by itself, sufficient to sustain the judgment below. The last two supplement each of the others. After a few words suggested by the brief on behalf of Petitioner, these propositions will be considered in their order.

The Assistant Attorney-General appears to have misapprehended the questions presented by this record. In consequence of this misapprehension his brief is addressed to the quite immaterial inquiry whether the interests here represented were "vested" or "contingent," in the technical sense, prior to the repeal which took effect on July 1, 1902. While it is recognized that no technically contingent interest was taxable unless the contingency was removed prior to the repeal it has been settled, ever since the decision in *Vanderbilt v. Eidman* (196 *U. S.* 480), that *no interest was taxable merely because it was technically vested* and, as will hereinafter be more fully shown, that the true test of taxability is whether or not there existed prior to the repeal an "absolute right of immediate possession or enjoyment" (*Hertz v. Woodman*, 218 *U. S.* 205, 219; *Vanderbilt v. Eidman*, 196 *U. S.* 480, 491-5, 499). Yet, on page 24 of his brief the Assistant Attorney-General declares that "an absolute right to future possession" was "taxable forthwith."

Respondents concede that counsel for Petitioner is correct in asserting (*Brief, pp.* 5, 8) that the state of this record does not permit any question as to the methods employed in valuing the annuities represented. The only question relating to this valuation that is open on this record is whether any assessment whatever could lawfully be made after July 1, 1902, and that question will be hereinafter discussed. The very interesting Constitutional and legal questions growing out of the *method* of assessment employed cannot properly be discussed in this case.

FIRST.

Section 29 of the Act of June 13, 1898, being repealed as of July 1, 1902, by the Act of April 12, 1902, did not grant to the United States any right to any tax on these legacies.

The argument in support of the foregoing will be arranged under three propositions, the first of which is as follows:

A. The universal test of the right of the Government to have any tax assessed under the legacy tax provisions of the Act of June 13, 1898, and amendments was, in the words used by the late Mr. Justice Lurton, speaking for the majority of this Court in Hertz v. Woodman (218 *U. S.* 205, 219) *that the "right of succession" should become, between June 13, 1898, and July 1, 1902, the dates of enactment and repeal, respectively, "an absolute right of immediate possession or enjoyment."*

It is obvious that no interpretation of Section 29 of the Act of June 13, 1898, can be satisfactory that does not supply a test of the right of the Government which will apply to all cases. At different times it has been urged that the right to receive the tax on account of a particular legacy or share arose (*a*) at the date of the death of the individual from whom the property passed, (*b*) twelve months after that date and (*c*) when the beneficiary became entitled to possess or to enjoy his distributive share or legacy. The first theory, that these taxes were imposed at the death of the intestate or testate, appears to be the contention of the Government in the present case, although it has been repeatedly rejected by the Supreme Court. *Vanderbilt v. Eidman,* 196 *U. S.* 480; *Hertz v. Woodman,* 218 *U. S.* 205; *U. S. v. Fidelity Trust Company,* 222 *U. S.* 158. Also, as to the interpretation of similar terms of the Act of June 30, 1864 (13 *Stat.* 223, 285), see *Clapp v. Mason,* 94 *U. S.* 589; *Wright v. Blakeslee,*

101 *U. S.* 174; *Mason v. Sargent,* 104 *U. S.* 689; *Sturges v. United States,* 117 *U. S.* 363.

Brief discussion of the decision in *Hertz v. Woodman, supra,* is suggested at this point, in view of the use of isolated expressions therein, that was attempted by counsel for the United States in applications for certiorari (*Eidman v. Lewisohn and other cases,* 218 *U. S.* 677-8) which were, however, denied. *Woodman's* case came before this Court on certificate from the Circuit Court of Appeals for the Seventh Circuit, which asked the determination of a single question, as follows:

> "Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing Act of April 12, 1902, relieve from taxation legacies *otherwise taxable* under Sections 29 and 30 of the Act of June 13, 1898, as amended by the Act of March 2, 1901?" 218 *U. S.* 205, 210-11.

The basis of the foregoing was that Congress, by an amendment of March 2, 1901 (31 *Stat.* 946) to Section 30 (not to section 29 which imposed the tax but to Section 30 which provided the system for its collection) had provided that the tax should be "due and payable in one year after the death of the testator." On the strength of this provision, it had been contended that the tax could not be lawfully exacted in any instance in which the property passed from a person who died "within one year immediately prior to the taking effect of the repealing act." On that question this Court had been twice equally divided (*Eidman v. Tilghman,* 203 *U. S.* 580; *McCoach v. Philadelphia, Trust, Safe Deposit & Insurance Company,* 205 *U. S.* 539) and the certified question was carefully phrased in order to obtain a decision by which it would finally be determined. Its very narrow terms were intended strictly to confine, and actually did confine, this Court to the inquiry whether the effect of the amendment of March 2, 1901 (to Section 30), which made the tax "due and payable one year after the death of the testator"

was of itself sufficient to relieve from taxation the estate of every person dying within twelve months of the repeal, even though every other condition essential to liability for the tax (like enjoyment and possession by the legatee) had been fulfilled. This was the effect of the words "otherwise taxable," contained in the question, as *they clearly comprehended the fulfillment of every condition save that made the basis of the inquiry.*

In passing upon a certified question this Court considers nothing and decides nothing not within the terms of the precise inquiry submitted for its determination. *United States v. Union Pacific,* 168 *U. S.* 505, 512.

Moreover, the statement of facts in the Certificate in *Woodman's* case, *supra,* contained the following:

> "That James F. Woodman died testate, at Chicago, Illinois, on the fifteenth day of March, 1902; that his will was admitted to probate on the third day of May, 1902, and letters testamentary issued to the Illinois Trust and Savings Bank as executor; that thereupon the said executor had in charge legacies of the clear value of $166,250, arising from personal property of the value of $190,554.05, payable, under the terms of said will, to the defendants in error." *October Term,* 1909, *No.* 640, *Certificate, p.* 2.

In the foregoing this Court was plainly told that, prior to July 1, 1902, Woodman's executors held legacies that were immediately payable to his legatees. This statement and the terms of the certificate made it the duty of this Court, in considering the question, to make any assumption, however extreme, that was necessary in order to justify the postulate that the legacies were "otherwise taxable." Of course, there are cases in which the right to possess or enjoy a legacy accrues immediately on the death of the testator. The law of the domicil controls, but such is generally the case as to specific legacies left by a solvent testator and legacies to those to whom such a testator stands *in loco parentis.*

The case now at bar presents no such situation. It is one in which the rights of enjoyment and possession were postponed beyond the date of the repeal. *Woodman's* case is authority for a single proposition which appears in two aspects, (1) that the right of the Government must coincide with the right of the legatee or distributee to immediate possession or enjoyment and (2) that the "due and payable" clause had nothing to do with fixing the date on which the obligation to pay the tax arose. In *Woodman's case,* the whole dependence of the claimants was necessarily upon this amendment of March 2, 1901, to Section 30 (*Hertz v. Woodman,* 218 *U. S.* 205, 220-4). The question now presented rests wholly upon the language of Section 29, the only section which established any tax on legacies, and *the case of respondents would be neither weaker nor stronger if the amendment of March 2, 1901, had never been passed.* This distinction is of the utmost importance.

The second theory, that the Government's right accrued twelve months after the death was also, as the foregoing analysis has made clear, rejected in *Hertz v. Woodman, supra.*

The third theory alone remains, if there is to be any test of the right of the Government to the tax which can be applied to all cases. All the decisions heretofore rendered are reconcilable upon the theory that the right of the Government to have the tax assessed accrued at the moment that the beneficiary became entitled to possess or enjoy his distributive share or legacy, and they can not be reconciled on any other principle. Moreover, that this is the correct theory has been expressly affirmed. That is to say, the Supreme Court has repeatedly held that the Act of June 13, 1898, did not create any liability for the legacy tax until the legatee became entitled to the actual enjoyment or possession of his legacy. For example, in *Vanderbilt v. Eidman,* 196 *U. S.* 480, it was said that—

> "It will be observed that the duties imposed in Section 29 have relation to two classes; first, legacies or

distributive shares passing by death and arising from personal property: and, second, any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon *the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other,* unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules. A consideration of the subsequent provisions of the section leaves no room for such a contention, . . ." 196 *U. S.* 480, 491-4.

Among numerous other expressions to the same effect in the same case, are the following:

> ". . . nowhere in the section is there contained language referring to technical estates in personalty, or treating them as subjects of taxation, despite the absence of the right to immediate possession or enjoyment." 196 *U. S.* 480, 494.

And, again:

> ". . . it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached." 196 *U. S.* 480, 495.

Also, referring to the amendment of March 2, 1901, to Section 29, which provided that the amount of the tax should be deducted from the particular legacy or distributive share on which it was charged, the court characterized it as—

> ". . . a provision plainly importing a practically contemporaneous right to receive the legacy or distributive share, and one which would be impracticable of execution if the tax was to be assessed and collected before the beneficiary and the rate of tax could certainly be ascertained." 196 *U. S.* 480, 499.

Quite as convincing is the reference to all the amendments of March 2, 1901, considered collectively, as follows:

> "The amendments, therefore, did not, in our opinion, justify the construction that Congress intended, by adopting them, to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act." 196 *U. S.* 480, 498.

The late Mr. Justice Lurton, speaking for the majority of the Court, in *Hertz v. Woodman, supra,* said:

> ". . . it has been also *conclusively decided in Vanderbilt v. Eidman,* that the tax or duty does not attach to legacies or distributive shares *until the right of succession becomes an absolute right of immediate possession or enjoyment.*" 218 *U. S.* 205, 219.

In *United States v. Fidelity Trust Company,* 222 *U. S.* 158, brought under the refunding Act of June 27, 1902, and not involving interpretation of the Act of June 13, 1898, the Supreme Court distinguished between the remainder interest "not *vested in possession or enjoyment*" that was held to have been unlawfully taxed in *Vanderbilt v. Eidman,* 196 *U. S.* 480, and the interest then at bar which must be treated "as a present unity in the *enjoyment* of the life tenant."

The conclusion that the liability arose at the time when there accrued a *"right to the immediate possession or enjoyment"* follows consistently upon numerous decisions under the similar tax of the Civil War period, which furnished the model for the Act of June 13, 1898.

Clapp v. Mason, 94 *U. S.* 589.
Wright v. Blakeslee, 101 *U. S.* 174.
Mason v. Sargent, 104 *U. S.* 689.
Sturges v. United States, 117 *U. S.* 363.
United States v. Kelly's Administrators, 28 *Fed.* 845.

In *Sturges v. United States*, 117 *U. S.* 363, there was a legacy of $100,000.00 "to be paid to him three months after he shall arrive at the age of twenty-one years," and *there was no intervening estate.* The testator died while the tax was in force but the time for enjoyment and possession of the legacy did not arrive until after the repeal. It was held that the tax was not imposed. This decision is directly opposed to the conclusion which the Assistant Attorney General attempts to draw from *Long's Estate*, 228 *Pa.* 594 (*Brief for Petitioner, p.* 16). See, also, *Wright v. Blakeslee*, 101 *U. S.* 174, in which the succession tax established by the Act of June 30, 1864 (13 *Stat.* 223, 285), was held to have been lawfully collected with respect to a devise of real estate *although the devisor died in* 1846, *nearly eighteen years before the taxing law was passed.* And, if the liability accrued at the death of the testator or intestate, Congress would not have found it necessary to pass the proviso of March 2, 1901 (31 *Stat.* 946), which excluded from the operation of Section 29 "any estate where the testator or intestate died before June 13, 1898."

In *Cahen v. Brewster*, 203 *U. S.* 543, the Supreme Court expressly recognized the fact that when Congress places a tax upon successions its *imposition*, in each instance, may be conditioned by the manner in which a particular State has exercised its control over matters of descent and distribution. For, referring not only to cases of State taxation but to *Knowlton v. Moore*, 178 *U. S.* 41, under the Federal tax, it was then said:

> "In other words, we defined the nature of the tax; *we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates, and usurp a power we did not and do not possess.*" 203 *U. S.* 543, 551.

The rule contended for is that which prevails in Great Britain. The decisions were carefully reviewed by Baron Lefroy, in the Irish Court of Exchequer, as follows:

"On the tenth of October (1842), the 5 and 6 Vic. c. 82, came into operation, which first imposed a duty on the transmission of a residue from a son to a father: and the residue not having been paid, satisfied, or discharged previously to the 10th of October, 1842, the question is, if the defendant is bound to pay the duty imposed by that act . . . The criterion of the duty payable, made by the Legislature, is the time of the transfer of the legacy; at one time, that was so apparent that no question was or could be raised on it. The duty was originally payable on the receipt for the legacy, and while that state of the law continued, it was like a receipt for money; and as the receipt must have borne the stamp in use at the time the money was paid; so it was with respect to legacies. And if the debt were payable at one time, but paid at another, the duty having, meanwhile, become dissimilar to that payable at the period of the accruer, the criterion of the amount of duty was the time of the payment of the money. It is plain, then, that so long as the duty was a stamp upon the receipt, no doubt could exist. But the consequence was found to be that, in some instances, no receipt was given; and, in cases, where a legacy was given to a minor, a question was raised, that, in as much as no receipt could be given, no duty was payable. In *Green v. Croft,* (2 *H. Bl.* 30) Heath, J. says: 'It is a great error in the legacy acts that legacies themselves are not chargeable, but only the receipts for them.' Acting on this hint, an act was passed making the duty payable expressly out of the legacy, to be paid, by the person having the execution of the will out of the general assets. The history of these acts is to be found in the case of *Hill v. Atkinson,* (2 *Mer.* 53): Lord Eldon, C., there says: 'Then comes the 20 Geo. 3, imposing a duty, rateably, on "receipts for legacies," which duty is augmented by two subsequent acts.' And after stating the decision in *Green v. Croft,* and the opinion of Heath, J., he says: 'The 36 Geo. 3, was afterwards passed expressly to remedy the defect complained of.' That shows the object of that statute to have been to improve the security of the revenue, not to alter the prior law as to the obligation to pay the duty at the time when the legacy was

actually paid, and not at the accruer of the right. In all the prior cases, *Attorney-General v. Lady L. Manners,* (1 *Price,* 411) the single question was, first, whether at the time at which the legacy or residue was payable, there was any duty; secondly, at what time it was retained, paid, satisfied, or discharged; but all refer to the day of payment as the test. In the case of *Attorney-General v. Lady Manners,* at the time of the making of the will, in 1771, the statute in force was the 20 Geo. III, c. 28. The 48 Geo. III, c. 149, sch. 3, was the first act imposing a duty of 8 per cent on any legacy or residue for the benefit of any stranger in blood to the deceased. At the time of the making of the will, no legacy to strangers was liable to this duty, and the question was, whether this statute intervening before the legacy was paid, delivered, retained, satisfied, or discharged, did not render it liable to pay this duty of 8 per cent; and the court held, that the legacy not being retained till after the 10th of October 1808, was liable to pay the duty imposed on every legacy over £20, retained, paid or satisfied after that day. In *Hill v. Atkinson,* speaking of that case, Lord Eldon, C., says: 'Whether there was an appropriation in that case is not now to be considered. It was the opinion of the Barons, that an executor, who is also a trustee, shifting a legacy from his hands, as executor, into his hands as trustee, does not thereby appropriate the legacy. But if, when a legacy has been paid into Court under a decree, and the trusts are declared accordingly, is it to be said there is no appropriation? that would be to deny what has never been called in question:' but he did not quarrel with the criterion of the amount of duty being ascertained by the duty payable, when the legacy was retained, paid or satisfied. In the case of the *Attorney-General v. Wood,* (2 *You. and Jer.* 290) it was distinctly stated, that the true criterion was the time the act, of whatever nature, was done, which amounted to a payment, discharge, or retention of the legacy; and that the existing duty, on that day, was the sole test whether any duty was payable, or the amount of it. I have no doubt on these grounds, but that is the true view." *Matter of Hillas,* 2 *Irish Jurist,* 36-7.

It will be observed that the English tax having been continuously applied for a very long period, but at different rates, the questions which have there arisen have principally related to the rate to be applied. But the determination that the rate to be exacted is the rate in force, not at the time of the death, but at the time of the accruer of the right to immediate possession or enjoyment, is the precise equivalent of the conclusion here sought, for the reason that if there is no rate there can be no tax.

Although the rulings of the Treasury Department have varied widely, from time to time, and are not consistent with one another, it is worth noting that during certain periods regulations have been in force which are practically in accordance with the principles herein advocated. Thus, Treasury Decision No. 20591, of January 19, 1899, in force until after the adoption of the amendatory Act of March 2, 1901, was as follows:

> "Legacy tax is not payable until the legacy is payable, and the legacy must not be paid until the tax shall have been paid."

Even as late as July 15, 1902, the Commissioner promulgated a rule which will be hereinafter set forth and considered (*post p.* 40) that would have prevented the demand for the tax involved in this case.

The second proposition to be maintained in support of the first point (*ante. p.* 7) is:

B. *The ordinary rule is that there can be no "absolute right of immediate possession or enjoyment" of any legacy or distributive share until, at least, the close of the period during which claims against the estate may be proved, and this rule prevails in Pennsylvania.*

Certain of the statutes of Pennsylvania, in force at the time of the death of Ferdinand J. Dreer and thereafter, and controlling the administration of his estate, are as follows:

"Legacies, if no time be limited for the payment thereof, shall, in all cases, be deemed to be due and payable at the expiration of one year from the death of the testator." *Section* 51, *Act of February* 24, 1834, *P. L.* 83.

"No action for the recovery of any such legacy shall be commenced until reasonable demand have been made by the legatee of the executor for the payment or delivery thereof." *Section* 52, *Act of February* 24, 1834. *P. L.* 83.

"No administrator shall be compelled to make distribution of the goods of an intestate, until one year be fully expired from the granting of the administration of the estate." *Section* 38, *Act of February* 24, 1834, *P. L.* 80.

"All debts owing by any person within this state, at the time of his decease, shall be paid by his executors or administrators, so far as they have assets, in the manner and order following, viz: 1. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servant's wages, not exceeding one year; 2. Rents, not exceeding one year; 3. All other debts, without regard to the quality of the same; except debts due to the commonwealth, which shall be last paid." *Section* 21, *Act of February* 24, 1834, *P. L.* 76.

"No executor or administrator shall be compelled to pay any debt of the decedent, except such as are by law preferred in the order of payment to rents until one year be fully elapsed from the granting of the administration of the estate." *Section* 22, *Act of February* 24, 1834, *P. L.* 76.

"Executors, after one year elapsed from the granting of the administration of the estate, upon the requisition of any legatee, or any other persons interested, shall pay and deliver, under the discretion of the orphans' court having jurisdiction of their accounts, all such legacies as are due and payable by them, or a proportionate part thereof, first deducting all demands against the estate, and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue, distributable under the intestate laws of this

commonwealth, they shall also distribute the same; . . . " *Section* 47, *Act of February* 24, 1834, *P. L.* 81.

"In every case of a devise or bequest to a widow, which, by force of any last will and testament or by operation of law, will bar such widow of dower, subject to her right of election of dower, or of the property devised or bequeathed, it shall be lawful for the orphans' court, on the application of any person interested in the estate of the decedent to issue a citation, at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time, not less than one month thereafter, in the said court, to make her election either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower, of which election a record shall be made, which shall be conclusive on all parties. If the widow shall neglect or refuse to appear upon such citation, then upon due proof to the court of the service thereof, the said neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower, of which a record shall be made, which shall be conclusive on all parties." *Act of March* 29, 1832, *Section* 32, *P. L.* 200.

"The 11th section of the act of 8th April, 1833, entitled 'An act relating to last wills and testaments,' shall not be construed to deprive the widow of the testator, in case she elects not to take under the last will and testament of her husband, of her share of the personal estate of her husband under the intestate laws of this commonwealth: but that the said widow may take her choice, either of the bequest or devise made to her under any last will or testament, or of her share of the personal estate under the intestate laws aforesaid." *Act of April* 11, 1848, *Section* 11, *P. L.* 537.

"A devise or bequest by a husband to his wife of any portion of his estate or property shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise: *Provided,* that nothing

herein contained shall deprive the widow of her choice either of dower, or of the estate or property so devised or bequeathed." *Act of April* 8, 1883, *Section* 11, *P. L.* 249.

The decisions of the courts of Pennsylvania interpret these statutory provisions, in accordance with their obvious intent, as postponing the right of legatees or distributees to demand possession or enjoyment until the lapse of one year from the granting of letters of administration.

Rastaetter's Estate, 15 *Pa. Sup.* 549, 553-5.
Jones' Appeal, 99 *Pa.* 124, 130.
Simpson's Appeal, 109 *Pa.* 383, 389.
Mulligan's Estate, 157 *Pa.* 98.
Robins' Estate, 180 *Pa.* 630, 633-4.

In the case at bar, the decedent died on May 24, 1902. Approximately five weeks later, when the legacy tax of June 13, 1898, was repealed, the value of his estate had not been ascertained and was not ascertainable. No one knew whether any legacy could be paid, much less, that there would be any residuary estate (and two of the annuities were charged on the residuary estate). The Orphans' Court had taken control of the personalty left by the decedent, through an executor, who held primarily for the benefit of the creditors (*Brown v. Fletcher, decided by Supreme Court of the United States, on January* 5, 1915) and the latter had a full year in which to present their claims.

> "The right of creditors to be paid out of a decedent's goods was recognized, both at common law and by statute, long before the right of succession was secured to his children and kindred. When a man dies in Pennsylvania, his estate, real and personal, comes within the jurisdiction of the Orphans' Court, to be administered, first of all for the benefit of his creditors, and next for legatees, devisees, and heirs: *Homer & Roberts v. Hasbrouck*, 5 *Wr.* 169. The personal estate is the primary fund for the payment

> of debts, but both personalty and realty are carefully hedged by statute against their appropriation to the prejudice of creditors." *Jones' Appeal*, 99 *Pa.* 124, 130.

During this period of administration there was no right of immediate enjoyment of the personal estate of the decedent, the right of enjoyment was in abeyance and both the legal title to the property and its possession were with the executors.

Griffith v. Frazier, 8 *Cranch* 9, 24.
Kane v. Paul, 14 *Pet.* 33.
Hagan v. Walker, 14 *How.* 29, 35.
Kendall v. Creighton, 64 *U. S.* 90.
Aspden v. Nixon, 45 *U. S.* 467.
Stacy v. Thrasher, 47 *U. S.* 44.
Hill v. Tucker, 54 *U. S.* 458.
Mackey v. Coxe, 59 *U. S.* 100.
Borer v. Chapman, 119 *U. S.* 587.

The subordinate character and uncertain value of the rights of legatees of personal property, pending the expiration of the period of administration and particularly that of the period during which claims against the estate may be produced, is well stated in *Carpenter v. Pennsylvania* (17 *How.* 156), in a paragraph that is quoted and reaffirmed in *Orr v. Gilman* (183 *U. S.* 278), as follows:

> "It is in some sense true that the rights of donees under a will are vested at the death of the testator, and that the acts of administration which follow are conservatory means directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But, until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil as that where the

> distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control prescribed by the State in the interests of public order, and are only irrevocably established upon its abdication of this control at the period of distribution." 183 *U. S.* 278, 284-5.

This is so far true that the testator cannot prevent the administrative process; he is not permitted to provide that his property shall pass directly to the legatee, or even to a trustee, but the State insists that administration shall intervene and thus that the rights of creditors and others shall be protected (*Wall v. Bissell,* 125 *U. S.* 382; 31 *L. Ed.* 772, 776).

The tax involved in this proceeding was "a burden cast upon the recipient" (*Knowlton v. Moore,* 178 *U. S.* 41, 60) of a legacy or distributive share, on "the transmission from the dead to the living" (*Knowlton v. Moore,* 178 *U. S.* 41, 56). Obviously such a tax, applying to personal property passing by will or by intestate succession requires three essential, definite and ascertainable things, without any one of which there can be no valid tax. There must be—

First. A decedent,

Second. Property left by the decedent in excess of debts,

Third. A distributee or legatee.

The essential necessity of an accurate admeasurement of the second element suggested, that is the balance of property over debts, is more evident when it is remembered that the rate of taxation provided in Section 29 was progressive, depending upon the amount of the property passing. And the significance of the third element is recognized when it is borne in mind that there was another progression of the rate, depending upon the relationship (or lack of it) be-

tween the decedent and the legatee or distributee. But neither the amount of the property in excess of debts or whether there was any such excess at all could be determined until the period for proving claims had elapsed. And by the disclaimer of a legatee named in a will the property might pass to a more remote relative or to a stranger in blood from whom the law would exact an higher rate of tax.

> "If, however, the legacy fails by reason of lapse or remoteness, or for any other cause, so as never to vest in or become payable to the legatee, no duty of course is chargeable in respect of it, any more than if it had never been given. And the result is the same in case of disclaimer, for every person until acceptance, actual or implied, is competent to renounce a benefit given to himself; and after such renunciation the bequest is as if it had never existed, and the title to the property bequeathed vests accordingly, not under or by virtue of the bequest, but on the footing of the bequest having no operation." *Hanson's Death Duties, Sixth Edition, pp.* 460-1.

The third and concluding proposition to be maintained in support of the first point (*ante p.* 7) is that:

C. The annuitants in this case had no "absolute right of immediate possession or enjoyment" prior to July 1, 1902, as they could make no enforceable demand for anything prior to that date.

It has already been shown that it is the general rule in Pennsylvania that legatees cannot enforce the payment of legacies until the expiration of one year after the granting of administration. The facts in this case are that the amount of the residuary estate, on which the two larger annuities were charged, was not ascertained or ascertainable prior to July 1, 1902 (*R.* 9): that nothing was paid to the trustees to constitute the fund from the income of which these annuities were to be paid prior to July 1, 1902 (*R.* 9), and

that the annuities not charged upon the residuary estate were not to begin until August 24, 1902 (*R.* 19), that is until three months after the testator's death. The Assistant Attorney-General declares (*Brief for Petitioner, p.* 15) that—

> "A like condition obtained as to payment in the *Fidelity Trust Company* case." 222 *U. S.* 159.

This is essentially misleading. In that case the testator died on March 16, 1899, and prior to the repeal of the tax law the legatee whose interest was taxed had received from her legacy the sum of $17,527.59 (*Record in United States v. Fidelity Trust Company, October Term* 1910, *No.* 548, *pp.* 4, 8). That is to say, in the *Fidelity Trust Company's* case the legatee's right to receive income began in 1899, more than three years before the law was repealed and before that date she actually did receive large sums—she entered upon the enjoyment of her life interest before July 1, 1902. Nothing of the kind happened or could have happened in the instant case, these legatees' rights were postponed, like that of the legatee in *Sturgis v. United States,* 117 *U. S.* 363, whose interest was held not taxable, until after the repeal.

SECOND.

No tax under the Act of June 13, 1898, could be imposed, or any individual liability therefor arise, except as the consequence of a lawful assessment and no assessment made after July 1, 1902, could be lawful.

If the collection of the tax from these respondents was warranted at all it must be by virtue of the "saving clause" which was a part of the repealing act (32 *Stat.* 97) or of Section 13 of the Revised Statutes (*Hertz v. Woodman,* 218 *U. S.* 205, 216-8). The "saving clause" reserved the right of the United States to collect—

> "all taxes or duties imposed by section 29 of the Act of June 13, 1898, and amendments thereof, prior to the taking effect of this act, ..."

that is, prior to July 1, 1902. Of R. S. 13, it has been said that its significance in this connection is that if, before July 1, 1902, there was—

> "any liability or obligation to pay the tax or duty imposed by Section 29 of the Act of June 13, 1898, that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, by plain implication, cuts down the scope and operation of the general rule in Section 13." *Hertz v. Woodman,* 218 *U. S.* 205, 218.

The proposition here maintained is that neither of the foregoing could apply to this case for the reason that there was no assessment of any tax on account of this estate until long after the repeal of Section 29—

> "The only section which imposes any tax upon inheritances is the 29th." *Hertz v. Woodman,* 218 *U. S.* 205, 219.

And because this tax was an *ad valorem* tax upon property the value of which could not be determined except after inquiry--

> "If there be anything besides death which is not to be doubted, it is that the Orphans' Court alone has authority to ascertain the amount of a decedent's property and order its distribution among those entitled to it." *Whiteside v. Whiteside,* 20 *Pa.* 473, 474.

And because it was an *ad valorem* tax levied according to varying rates, the particular rate in each case not being ascertainable until both the amount of the legacy or share and the identity of the legatee or distributee were known—

"Indeed, the amendatory act contained new provisions not expressly found in the original act, . . . such as the proviso . . . plainly importing a practically contemporaneous right to receive the legacy or distributive share, . . . which would be impracticable of execution if the tax was to be assessed and collected before the beneficiary and the rate of tax could certainly be ascertained." *Vanderbilt v. Eidman,* 196 *U. S.* 480, 498-9.

And because taxes of this character are not *"imposed"* in any particular case, nor does any *"liability"* to pay them rest upon any individual or property, until there is a lawful assessment, including, under nearly all conditions, a *quasi*-judicial determination of the value to which the *ad valorem* rate is to be applied.

Differently expressed, the proposition here maintained is that whenever there accrued to the Government a right to proceed against an individual or against any particular property, on account of any tax under Section 29, that right could not be perfected to the extent of imposing a liability upon any individual or property save by a lawful assessment. This is the substantial effect of the decision of this Court in *People v. Weaver,* 100 *U. S.* 539; 25 *L. Ed.* 705, in which the Court said:

"This *valuation,* then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation." 25 *L. Ed.* 705, 707.

And in the paragraph following that in which the foregoing appears, the Court quoted, with approval, the following from *Cooley on Taxation:*

"When taxes have been properly decided upon, an assessment may become *an indispensable proceeding in the establishment of any individual charge,* against either person or property. This is always requisite

> when the taxes are to be levied in proportion to an estimate, either of values, of benefits, or the results of business." *Cooley on Taxation, First Edition,* 258; *Quoted with Approval,* 25 *L. Ed.* 705, 707.

In the second edition, (the last edition that was completed by Judge Cooley) of the same great work, it is said:

> "An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities." *Cooley on Taxation, Second Edition,* 352.

The above is repeated *verbatim* in the Third Edition, *p.* 597. Other citations and authorities, selected from a vast multitude, follow:

> "The assessment is an indispensable prerequisite to the validity of a tax against any individual; for without a valid assessment there can be no lawful attempt to collect the tax or to enforce it against any specific property." 37 *Cyc.* 987.
>
> "In laying an *ad valorem* tax, a valuation of the property of each person or corporation liable to be taxed is an absolute necessity. In no other way can the amount to be paid by each taxpayer be ascertained. A valid assessment is, therefore, indispensable. This doctrine is as old as the law of taxation, and is the one proposition on which all courts and writers are agreed. It is upheld by all courts, State and Federal, as that without which there cannot be a valid charge for a tax." 27 *Amer. & Eng. Ency. of Law, 2d Ed.* 660-1.
>
> "If, therefore, this loan is taxable in the hands of resident owners, at its actual value, a legal ascertainment of that value is essential to the assessment of a valid tax. The tax of a citizen is the result of the rate, applied to the value of the property which he owns, and he is not taxed until the rate is thus applied, by some legal mode of adjustment; no duty of payment arises, no proceeding to collect can be sus-

tained, until the tax is thus created." *Commonwealth v. Lehigh Valley Railroad*, 104 *Pa.* (1883) 89, 101-2.

"The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed. . . . The assessments, being unlawful, created no lien upon the land." *Van Brocklin v. Anderson*, 117 *U. S.* (1886) 151; 29 *L. Ed.* 845, 855.

California v. Central Pacific, 127 *U. S.* 1.

Supervisors v. Stanley, 105 *U. S.* 305, 308.

Delaware, Lackawanna & Western v. Pa., 198 *U. S.* 341, 358.

Londoner v. Denver, 210 *U. S.* 373, 386.

Powder River Cattle Co. v. Commissioners, 45 *Fed.* 323, 328-9.

State v. South Penn. Oil Co. (*W. Va.*), 24 *S. E.* 688, 697.

It is, then, a general rule of universal acceptance and application, that an *ad valorem* tax is never imposed upon any individual or upon any particular property, and that no liability to pay such a tax can attach to any individual or property, until there has been a lawful assessment. To this rule there is no exception. But there are cases in which *ad valorem* taxes may be assessed by the legislature. Either the tax in the case at bar belongs to this exceptional class or it does not belong to it. If the latter is the case, there was clearly no authority to make the assessment on July 1, 1903, when the Commissioner of Internal Revenue attempted to make it, and Respondents are entitled to recover. It is important, therefore, to ascertain precisely the limits within which legislative assessments are permissible. It is submitted that such assessments may constitute due process of law in the case of specific taxes, or of taxes proportioned to a value that is not variable or uncertain and in no other cases. The rule is admirably stated in the following extract:

"But in the case of taxes laid upon solvent securities, certificates of deposit, mortgages, undivided profits, or the like, *the nominal or face value of which is identical with the actual value,* the assessment may be made by the Legislature without the intervention of assessing officers. 27 *Ency. Law.* 663." *State v. Clement National Bank,* 84 *Vt.* 167, 182.

It will be noted that *the identity of the face value and the actual value* is made the basis of the definition and the test of the right of the legislature to make assessment.

The same distinction is recognized in the following:

"The choice of a specific tax by the legislature does not, however, deprive the individual taxpayer of due process of law, for so far as the determination of a question of fact is incidentally involved in the course adopted, that determination is a necessary consequence of the exercise of the taxing power. But the legislature may adopt a different course, leaving such questions for determination by the officials charged with the execution of the taxing laws, who act in a judicial or *quasi*-judicial capacity and must proceed on notice and hearing. This is necessarily the case, when, instead of a specific, an *ad valorem* tax is selected. Then before an individual liability for the tax can arise, it is essential that there be an assessment of the property to be taxed, and an apportionment of the tax in accordance with the valuation determined by assessment and the rate of taxation."—*L. P. McGehee, "Due Process of Law Under the Federal Constitution," Northport, N. Y., Edward Thompson Company,* 1906; *p.* 236.

And in *Hagar v. Reclamation District,* 111 *U. S.* (1884) 701, the line of demarkation is made very plain, although it is there coupled with discussion of the concurrent right to notice of the assessment proceedings. Mr. Justice Field, speaking for the Court, said—

"Of the different kinds of taxes which the State may impose, there is a vast number of which, from

their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, . . ." 111 *U. S.* 701; 28 *L. Ed.* 569, 572.

See, also:—

McMillen v. Anderson, 95 *U. S.* 37.
Bell's Gap Railroad v. Pa. 134 *U. S.* 232.
Turpin v. Lemon, 187 *U. S.* 51.
Hodge v. Muscatine County, 196 *U. S.* 276, 280.
Central of Georgia v. Wright, 207 *U. S.* 127, 138.

The instances in which it has been held that assessment of taxes has been lawfully made by Congress illustrate the rule that this is permissible only when the taxes are specific or a percentage of a value necessarily certain and definite—where the nature of the thing taxed leaves no room for, or purpose to be served by, a valuation. Thus, in *Dollar Savings Bank v. United States*, 86 *U. S.* (1874) 227, the majority of the Supreme Court held, over the objection of Mr. Justice Field and Mr. Justice Bradley, who believed that under all circumstances and without exception "the assessment roll should be regarded as conclusive as to the persons or things liable to taxation," that a bank tax of five per cent "on all undistributed sums made and added during the year to their surplus or contingent funds" (*Act of July* 13, 1866, 14 *Stat.* 98, 138) did not require "other assessment than that made by the statute." Mr. Justice Strong, for the majority of the Court, said:

> "There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank and without more it made the bank a debtor." 86 *U. S.* 227; 22 *L. Ed.* 80, 83.

In *King v. United States*, 99 *U. S.* (1879) 229; 25 *L. Ed.* 373, and in *United States v. Erie Railroad*, 107 *U. S.* (1883) 1; 27 *L. Ed.* 385, the tax as to which it was held that "the law made the assessment" was one of five per cent upon the amount of interest paid upon the mortgage bonds of railway companies (*Act of July* 13, 1866, 14 *Stat.* 98, 138). In *United States v. Philadelphia & Reading*, 123 *U. S.* (1887), 113; 31 *L. Ed.* 138, it was apparently taken for granted that the same rule applied to a tax on the amount of undivided profits (*Act of June* 30, 1864, *as amended by Act of July* 13, 1866, 13 *Stat.* 223, 284; 14 *Stat.* 98, 138). The only additional case is that of *United States v. Ferrary*, 93 *U. S.* (1876) 625; 23 *L. Ed.* 832, in which it was held that liability for a tax of fifty cents per gallon on eighty per cent of the capacity of a distillery, as shown by an official

survey and estimate, a copy of which must be furnished to the distiller (*Act of July* 20, 1868, 15 *Stat.* 125, 127), was within the same principle.

> "The law fixed the rate at fifty cents for each gallon of spirits produced, and the survey and estimate which was furnished him informed him of the producing capacity of his distillery, and made it his duty to pay the tax on at least eighty per cent of that. Thus the law fixed both the *rate* and *amount.*" 93 *U. S.* 625; 23 *L. Ed.*, 832, 833.

In the case at bar the law fixed the *rate,* but the *amount to be paid* was not fixed until the *amount to which the rate must be applied* was determined and the latter was determinable only by a valuation, that is by an assessment.

Section 29 established an *ad valorem* tax, the amount of which was to be paid out of the portion of each distributee or legatee and to be determined by the application of fixed rates of percentage to the "clear value" of his share or legacy. The term "legacy" may include any character of property. The value of a legacy may be evident upon its face or it may be doubtful and difficult to ascertain; it may be stable or it may be speculative; it may be possible of realization in a broad and constant market or the market may be narrow and irregular; a legacy may consist of cash or it may consist of "securities" of great face value and little or no real value. The law of assessment must apply alike to all legacies. In the case at bar the legatees all received life annuities and if these annuities were not taxable, nothing was taxable. Obviously the value of a life annuity depends, in any individual case, upon many facts peculiar to that case, among them the following:

1. Age of the annuitant.
2. State of the annuitant's health.
3. Annuitant's habits, occupation and locality of residence.
4. Rate of interest properly to be used in calculating the present worth of future payments.

In this case, life annuities were valued (*R.* 7) in the pretended assessment that was made after the repeal of the tax (*R.* 9), as follows:

Legatee.	Amount of annuity.	Valuation on which tax was claimed.
Edwin Greble Dreer..........	$2,500	$38,293.05
Abigail D. Dreer.............	2,000	33,753.52
Frederick A. Dreer...........	8,000	10,975.68
Ferdinand J. Dreer..........	8,000	15,264.82

That these valuations required the ascertainment of facts, and were not self-revealing or not to be affected by inquiry or evidence, is shown by the fact that two annuities of $8,000 each were, doubtless in consequence of some fact or assumed fact not disclosed by the record, given very different valuations. Moreover, the two larger annuities were not charged upon personal property alone but upon the whole residuary estate, both real and personal (*R.* 20-21), and, as legacies arising out of real estate were not taxable, it was necessary in fixing the amount of tax, if any, that was due, to ascertain what portions of these annuities would actually be provided for out of the personal property that passed to the trustees with the residuary estate. Therefore, a valuation was essential.

Yet no valuation or assessment was made or attempted until long after the repeal of the law. Hence, neither the "saving clause" nor R. S. 13 preserved any right which could be perfected by an assessment after that date, for such *ad valorem* taxes are "imposed" only when an assessment is made by the proper officers and "liability" arises only when the amount of the obligation has been made definite by assessment.

The necessity for an assessment was recognized by the Treasury Department, which, although it could not have made an assessment before July 1, 1902, as the necessary

facts were not ascertainable until long after that date, and did not attempt an assessment until the year 1903, finally made a pretended assessment in which each annuity was given a separate valuation, in which annuities of the same amount were given different valuations and in which annuities of different amounts were given different valuations that were not, however, proportionate to their amounts. The law, too, recognized the necessity of a valuation and declared by whom the assessment should be made (*Act of June* 13, 1898, *Section* 31; 30 *Stat.* 465; *R. S.* 3182). All this is utterly inconsistent with any suggestion that this is a case in which there was or could be a legislative assessment.

The pretended assessment of 1903, was, however, no assessment at all. Congress, in its wisdom, had, in repealing the taxing law, saved only the taxes "imposed" prior to the repeal, which is precisely the same as saying "only the taxes *assessed* prior to the repeal." All authority to make new and additional assessments, that is to impose new and additional taxes, had disappeared by the repeal, as of July 1, 1902, of Section 29, the only portion of the Act of June 13, 1898, under which any legacy tax at all could have been imposed.

> "A valid assessment is, of course, indispensable as a prerequisite to levying a valid tax." *Western Union v. Howe*, 180 *Fed.* (1910) 44, 51.
>
> "Unless an assessment is made, as provided by law, no foundation is laid for the collection of the tax." *Custer County v. Anderson*, 68 *Fed.* (1895) 341, 342.
>
> "During the period when, by law, property was to be valued for taxation purposes and a tax assessed, these steps were not taken. . . . The defendant, upon finding upon the annual record no valuation of his lot, was under no obligation to make any application to the taxing officers. It was not a case for correction; for there could be nothing to correct when there was no valuation for assessment.

> "The subsequent apportionment, in November, 1883, of values and taxes, howsoever done, was ineffectual to validate previous proceedings, or to supply the defects, by which defendant's lot escaped assessment.
>
> "The only conclusion to be reached is that there was a failure to impose any tax for the year 1883, and, therefore, the proceedings for the sale of the land were void." *May v. Traphagen, (New York Court of Appeals)* 139 *N. Y.* (1893) 478, 481-2.

It is almost superfluous to remark that the case here presented is very different from one depending upon allegations that errors of assessment were committed—the case at bar is one of a pretended assessment that was made when no assessment could be lawful.

THIRD.

The assessment and collection in this case were prohibited by Section 3 of the Act of June 27, 1902 (32 Stat. 406).

We contend that the interests on account of which the taxes of which the recovery is now sought were collected were contingent beneficial interests which did not "absolutely vest in possession or enjoyment" prior to July 1, 1902, within the intendment of the amending and refunding act of June 27, 1902 (32 *Stat.* 406), and that the collection was, therefore, in violation of the prohibition of that act. The third section of the Act referred to, concludes with the following sentence:

> "And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to sai l July first, nineteen hundred and two."

The foregoing was, in effect, an amendment to Section 29 of the Act of June 13, 1898, as theretofore modified by amendments, and excluded from the future operation of that section all interests similar to those as to which the sentences immediately preceding had directed that, if the tax had been paid, it should be refunded. This prohibition was in effect when, in the case at bar, the pretended assessment and the collection were made.

It is necessary to give broad effect to the terms "contingent" and "absolutely vested" in the foregoing, for Congress, in passing the Act, applied both of them in connection with intestate estates, administrators and distributive shares. Thus, omitting only the words "executor," "legacy" and "or trustee," which are certainly not words capable of restricting the meaning of any other words, the whole section would read:

> "That in all cases where an ADMINISTRATOR shall have paid, or shall hereafter pay, any tax upon any DISTRIBUTIVE SHARE of personal property under the provisions of the Act approved June 13, 1898, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on CONTINGENT BENEFICIAL INTERESTS which shall not have become vested prior to July 1, 1902. And no tax shall hereafter be assessed or imposed under said Act approved June 13, 1898, upon or in respect of any CONTINGENT BENEFICIAL INTEREST which shall not become ABSOLUTELY VESTED IN POSSESSION OR ENJOYMENT prior to said July 1, 1902."

These words "distributive share" and "administrator" cannot be treated as redundant, as surplusage or as having

no meaning. They require, by a very elementary rule of statutory interpretation, that a meaning shall be found, if such a meaning exists, for the words "contingent beneficial interests which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902," that is broad enough and non-technical enough, to apply to distributive shares. *Market Co. v. Hoffman*, 101 *U. S.* 112, 25 *L. Ed.* 782, 783-4; *Montclair v. Ramsdell*, 107 *U. S.* 147, 27 *L. Ed.* 58, 60; *U. S. v. Gooding*, 12 *Wheat.* 460, 477; *Rice v. Railroad Co.*, 66 *U. S.* 358, 17 *L. Ed.* 147, 153; *Stephens v. Cherokee Nation*, 174 *U. S.* 445, 43 *L. Ed.* 1041, 1053; *U. S. v. Parish*, 214 *U. S.* 124, 135-6. And when such a meaning has been found it will necessarily apply to all cases, for whatever meaning this clause has with relation to distributive shares it must have with relation to legacies.

In the recent case of *Jones, Administrator, v. United States*, decided by the Court of Claims on March 23, 1914, that Court held that the language of the prohibitory sentence applied to distributive shares in an estate situated precisely as the estate now at bar, save in the one particular that it was the estate of an intestate, while the case now presented is that of interests passing by will. The decision does not, however, rest upon so narrow a basis as the distinction between intestate and testate estates, but upon broad principles that are as applicable to the one as to the other. This will appear from the following extracts:

> "As the personal estate remaining at the end of the year after the payment of debts and charges and costs of administration did not come into the actual possession or enjoyment of the two heirs entitled until after July 1, 1902, the amount they were to receive was uncertain for and during the time the administrator was in charge. Before that date they could not demand, nor were they entitled to receive in possession, any part of the inheritance under the law which kept the administrator in charge. Certainly there was nothing actually vested in these heirs until

after the debts were provided for and the legitimate costs and expenses of the administration were ascertained and discharged. None of these things occured prior to July 1, 1902.

. . . .

"But the authorities indicate that the language of the refunding statute must be taken in a broader sense and as referring to the time when the beneficial interests were received, or were capable of being received, into actual and absolute possession or enjoyment, and not referring necessarily to the strict legal character of the interest. The statute qualifies the words 'absolutely vested' with the further words 'in possession or enjoyment,' thereby defining the nature of the vested estate prior to the refunding act. The courts have said that the tax is leviable at the time the rate could be ascertained. The rate of the tax assessable could only be determined after the debts and legitimate incidents of the administration of the estate became known. In the collection of debts due an estate the administrator may incur expenses, chargeable against the assets in his hands, and in resisting claims interposed against the estate expenses and costs may be incurred, and there are, of course, certain costs and legal expenses attaching to an administration. When these are known and deducted from the whole amount of the assets the distributive share of each distributee can then only be known and the rate of the death duty be fixed. Until that time the 'beneficial interest' was necessarily contingent in that sense which relates to the amount of it, and consequently the rate of tax in the present instance was uncertain until the beneficial interest could be paid. If the tax could only be levied at the time the distributees receive, or could rightfully demand possession or enjoyment, it must follow here that these distributive shares were contingent beneficial interests which did not come into possession or enjoyment prior to July 1, 1902."

The case in which the foregoing was said is now on appeal to this Court (*Docket No. 450, present term*), was argued during December, last, and is now awaiting decision. In view of that fact, nothing more will be said upon this point

save that the logic of the decision of the Court of Claims applies with equal force to the case at bar. Certainly it will not be denied that the residuary legatee under a will is, in every aspect of his situation, on a parity with the distributee of an intestate, and there could be no force in an interpretation of a taxing statute which, in the absence of words plainly indicating that purpose, would relieve distributees and residuary legatees from taxaton and leave subject thereto legatees who had no earlier or more certain title to the benefits defined by their testators. Moreover, the Supreme Court in *Hertz v. Woodman*, 218 *U. S.* 205, 222-3, held that the term "testator," as used in the amendment of March 2, 1901 (31 *Stat.* 946-8), was intended to include intestates and that "the omission may be supplied by necessary implication." This conclusion would be radically inconsistent with any interpretation which would leave the Act more favorable to one class of estates than to the other. Congress could not have intended such an injustice.

FOURTH.

By adopting the construction now contended for by the Petitioner, the Treasury Department contrived to collect a greater amount on account of legacy taxes during the year after the repeal than during any other period of equal length. Congress cannot have intended this result.

During the year which began with July 1, 1902, the date on which the tax was repealed, and ended with June 30, 1903, the United States collected, on account of the repealed tax, the sum of $5,356,774.90 (*Report of Commissioner of Internal Revenue, Treasury Annual Reports*, 1903, *p.* 526). This was more than was collected during any other year (*Reports of Commissioner of Internal Revenue*, 1899, *p.* 10; 1900, *p.* 11; 1901, *p.* 10; 1902, *p.* 10). That is to say, during the year in which, according to the promise of the report of

the Committee on Ways and Means of the House of Representatives, recommending the repeal of war taxation, (*House Report No. 320, Fifty-Seventh Congress, First Session*), presently to be referred to in more detail, the taxpayers should have had a saving from this form of taxation amounting to more than $5,250,000, the Government contrived to collect more than it had collected from that source during any prior year.

Bearing in mind that anything which was collected after July 1, 1902, was collected by virtue of the "saving clause" in the repealing act, it is at once apparent that either (1) the Government exacted considerable sums upon a wrong construction of the "saving clause" or (2) that this was the most extraordinary "saving clause" in the history of taxation. On the Government's theory, the "saving clause" was more effective as a revenue producer than the original act. Congress cannot have intended this result. The purpose of the "saving clause" is well indicated by the description of what might have happened if there had been no "saving clause," in the opinion of Mr. Justice Lurton, speaking for the majority of this Court in *Hertz v. Woodman:*

> "There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations, and as a remission of penalties and forfeitures dependent upon the destroyed statute." 218 *U. S.* 205, 216.

There can be little doubt that on July 1, 1902, there were many cases, involving a considerable aggregate, in which the right of the Government to receive legacy taxes had become perfect, but in which payment, for one reason or another, had been delayed. Doubtless there were cases in which assessment had been made, but the taxpayer had resisted or

postponed payment. It may be assumed that cases of this character were in litigation, the Government having sued to recover the tax. Therefore, it is not contended that a large part of the $5,356,774.90, which was collected during the year immediately following the repeal, was not properly collected, but it is contended that the astonishing result, that the year following the repeal should be more productive of revenue than any year previous to the repeal, is strongly persuasive that the law was erroneously construed by the tax gatherers. This conclusion is vastly strengthened when it is noted that this result was obtained by means of new constructions, placed upon the law by the Commissioner of Internal Revenue, which reversed prior constructions by the same officer. Thus, the tax which was collected in the instant case would not have been demanded by the Collector of Internal Revenue, except for the following construction by the Commissioner of Internal Revenue, which was not adopted until November 14, 1902:

> "It must be held, therefore, that tax attached to every vested interest in personal property in actual value above $10,000, passing under the will of any person who died prior to July 1, 1902, and since June 13, 1898, though the actual possession of that interest, whether by the trustees or beneficiaries, was postponed to July 1, 1902, or later." *Treasury Decisions, Internal Revenue, Vol.* 5, *p.* 193, *No.* 595.

The foregoing, holding in substance, that these taxes were imposed at the date of the death in the case of all interests that were not technically "contingent" reversed a construction that was promulgated on July 15, 1902, under which the interests in the case at bar would have escaped taxation. The pertinent clause of this rule was as follows:

> "When the decedent died prior to July 1, 1902, and the property was left in trust by the will, but had not been turned over to the trustee before July 1, 1902, legacy tax will not accrue." *Treasury Decisions, Internal Revenue, Vol.* 5, *p.* 140, *No.* 630.

For the Government to prevail in this case, it will be necessary to sustain the construction of November 14, 1902, first above quoted, and to condemn the prior construction, but the plain invalidity of the construction of November 14, is made evident by the following extract from the decision of this Court in *Vanderbilt v. Eidman:*

> "Concluding as we do, that there was no authority under the Act of 1898 for taxing the interest . . . . . it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government." 196 *U. S.* 480, 501.

It is the intention of Congress which must control the interpretation of this taxing statute, although it is settled that in seeking the legislative purpose, in a matter so verging upon the arbitrary as the requirement of enforced contributions to the support of government, that purpose will be presumed to have been expressed with especial care and, hence, doubts and ambiguities will be resolved in favor of the taxpayer. *Eidman v. Martinez,* 184 *U. S.* 578, 583; 46 *L. Ed.,* 697, 701.

There is abundant evidence that Congress intended that the collection of legacy taxes, under the Act of June 13, 1898, should substantially stop on June 30, 1902. Competent and persuasive evidence as to the intent of Congress, embodied in the repealing act of April 12, 1902, is to be found in the condition of the finances of the United States at the time and in the report of the Committee on Ways and Means of the House of Representatives (*House Report No.* 320, *of February* 3, 1902, *entitled "Repeal of War-Revenue Taxation," Fifty-Seventh Congress, First Session*) which recommended its enactment. That such evidence is competent—

The Delaware, 161 *U. S.* 459, 472;
Buttfield v. Stranahan, 192 *U. S.* 470, 495.

The condition throughout the first half of the calendar year 1902; in April, 1902, when the repealing act was passed, and until long after July 1, 1902, when it took effect, was that the Federal government was draining into its treasury, by taxation, the circulating medium of the country, and was finding it impossible, to restore it to circulation fast enough to prevent interference with trade. This was largely the result of the fact that the act of June 13, 1898, had been immensely productive of revenue, while a succession of bountiful harvests and general business activity had caused such extensive importations as to raise the customs receipts to an unprecedented total. The Statistical Abstract of the United States for 1910 (*p. 677*), shows that the excess of ordinary Federal receipts over ordinary expenditures for the three years that ended with June 30, 1902, amounted to $248,532,420. Under these conditions, there was general protest against the continuance of war taxes in time of peace, when their principal effect was to pile up in the Treasury an useless, unwieldy and inconvenient surplus. The public demanded reduced taxation, and the Administration and both parties in Congress assented. The report of the Committee on Ways and Means of the House of Representatives, in favor of the repeal of the special internal revenue taxes resorted to in order to defray the cost of the Spanish War, presents the following summary of the fiscal condition of the Government:

> "It is a wonderful condition of our national finances which enables Congress to propose a reduction of $73,000,000 in the annual revenues. History furnishes no parallel to the situation. We had on the first day of the present month in the Treasury an available cash balance of $177,632,088.26, and this notwithstanding the fact the Treasury has paid out of this available surplus during the present fiscal year in the purchase of bonds for the sinking fund the sum of $61,196,444.56.
>
> "The Secretary of the Treasury in his annual report estimated the surplus of revenue over expendi-

tures for the present fiscal year at $100,000,000. Subsequent events have confirmed this estimate as conservative and reasonable. With this surplus for the year it would seem that notwithstanding this reduction of $73,000,000 we will still have a surplus of $27,000,000 for the next fiscal year.

. . . .

"A surplus is a more healthy condition of affairs than a deficit, and no harm results from it so long as there are outstanding bonds to be paid. There is no valid reason why we should continue to accumulate it, however. None of our outstanding bonds are now due. We can only purchase them in the open market. Our credit is so astonishingly good and our bonds in consequence bring so large a premium that it is difficult to purchase them in the market. Sound business judgment dictates a sweeping reduction of our revenues." *House Report No. 320, of February 3, 1902, entitled "Repeal of War Revenue Taxation," Fifty-Seventh Congress, First Session, p. 3.*

The purpose of the Act of repeal thus recommended, stated in the first sentence of the report was:

"To repeal all the various provisions of an Act entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' approved June 13, 1898, and of the act amendatory thereto, approved March 2, 1901, which impose any taxes (except upon mixed flour)."

On page 2 of the report it was further stated that for the fiscal year which ended with June 30, 1903, there would be "a total relief from war taxes on account of this bill amounting to $73,250,000." Holding this sum of $73,250,000 in mind it is only necessary to discover from the report how it was made up in order to ascertain whether Congress intended that revenue should be derived from the legacy tax after July 1, 1902, the date of the repeal and the first day of the fiscal year in which citizens were to be relieved of this burden of war taxation. On this point the report is complete

and definite. Page 4 shows the following receipts during the first half of the fiscal year 1902 (that is, from July 1, 1901, to December 31, 1901, inclusive) under the internal revenue features of the War Revenue Act:

Item.	Half-year's receipts.
Schedule A	$6,925,145.27
Schedule B	324,527.59
Beer	14,343,317.40
Special taxes	4,226,229.41
Tobacco	4,908,734.71
Snuff	268,879.95
Cigars	344.99
Cigarettes	16,269.04
Legacies	2,634,963.74
Excise tax	493,682.42
Mixed flour	1,585.55
Additional taxes on tobacco and beer	8,782.11
Total	$34,152,462.18

The Court is respectfully asked to note particularly the item "Legacies, $2,634,963.74," which is the fourth from the end of the foregoing table and, of course, a part of the "Total, $34,152,462.18." The Committee merely multiplied this total by two and, obtaining $68,304,924.36, substituted the round figure $69,000,000.00, and stated the latter amount as the "total of relief" to the people by cutting off these items on and after July 1, 1902.

> "As we have already seen, the receipts under the amended law for the first six months of the present fiscal year amount to $34,152,462.18, indicating for the full year $68,304,924.36. It is reasonable, therefore, to expect a gross revenue from the law as it stands to-day of about $69,000,000 from its internal revenue features for the present fiscal year."—*Report of Ways and Means Committee, p. 2.*

It required another step to reach the aggregate estimate of relief of $73,250,000 and the nature and details of that

step are extremely persuasive for they show that in the single instance in which the relief from taxation was postponed to a later date than July 1, 1902, the Committee, in its effort to deal frankly with the public, was most careful to explain the fact and to make full allowance for the delay, in its calculations. There was to be an additional relief of $4,250,000 by means of the repeal of the tax on imports of tea. So, as to the twelve months from July 1, 1902, to June 30, 1903, the Committee said:

> "Adding this to the internal revenue reduction of $69,000,000, we have a total relief from war taxes on account of this bill amounting to $73,250,000."—*P.* 2.

But, unlike the other taxes, the duty on tea was not to be stopped on July 1, 1902; its collection was to continue until January 1, 1903, that is, during the first six months of the fiscal year for which the relief of $73,250,000, was estimated. And, therefore, as to the revenue from this source, the Committee said:

> "This year it will probably amount to $8,500,000. This bill repeals the duty on tea, the repeal to take effect January 1, 1903. We shall therefore receive the revenue from this duty for the first six months of the next fiscal year, and the reduction on this article will be only one-half of the annual revenue, or $4,250,000."—*P.* 2.

The tax on tea was singled out from the other war taxes for exceptional treatment in the postponement of the effective date of the repeal (the mixed flour tax was negligible as a source of revenue and, as such, was properly ignored in the calculations of the Committee) and the Committee thought that the reasons for this exception should be fully stated.

> "There were reasons which prompted the Committee to postpone the repeal of Section 50, imposing the duty upon tea, to January 1, 1903, which seemed to them well founded."—*P.* 2.

And substantially four-fifths of page 2 is devoted to an explanation of this exception.

Now the contention of the Government in the present case is that the legacy tax was intended to be collected with respect to the estate of every person dying prior to July 1, 1902 (and on and after June 13, 1898), which, considering the customary period allowed for the presentation of claims and the ordinary and inevitable delays incident to the collection of assets and the settlement of estates, necessarily involves the proposition that Congress intended the continuance of these collections, in substantially undiminished volume, for at least another twelve months. And the fact is that, *by reason of the enforcement, by the Treasury Department, of the theory of interpretation which the Government seeks to sustain in this action, the amount collected under color of this repealed tax law, during the period from July* 1. 1902, *to June* 30, 1903, *that is during the precise year in which the Committee on Ways and Means said there would be no such taxes, was considerably greater* (*Report of Commissioner of Internal Revenue, Treasury Annual Reports,* 1903, *p.* 526) *than during any other year.* This result cannot be reconciled with the Committee's figures. Their plain and only consistent consequence would have been the substantial cessation of this source of revenue on July 1. 1902, the date the repealing act took effect. The Committee knew that $2,634,963.74 (*Report. p. 4*) had been collected from this source between July 1 and December 31, 1902: 1 it estimated that twice that amount (as a part of the $69,000,000—*Report, pp. 1 and 2*—to be saved to citizens by relief from internal revenue taxation) would be saved to the taxpayers between July 1, 1902, and June 30, 1903. If it had intended to continue the legacy tax, so as to permit such taxes to flow in actually increased volume into the public treasury after and in spite of the repeal, it would have deducted $5,269,927.48 from the aggregate of $69,000,000, and stated the relief from internal revenue taxes as $63,-730,072.52 or thereabouts. *Ample allowance was made in*

the Committee's estimates for the six months' continuance of the tea tax, the reasons for its continuance were explained at length; yet counsel for the Government now contend that with no allowance in the estimates and no explanation in the report the legacy tax was continued for at least twelve months. If this could be admitted, it would be to admit that the Congress intentionally misled and hoodwinked the American people with a false pretense of relief which there was really no intention to accord. The amazing contention that a repeal which was expressly stated to take effect on July 1, 1902, had actually no practical operation until July 1, 1903; the remarkable claim that during twelve months after the date of repeal the tax was to be collected as though there had been no repeal, finds not a line or a word of justification in the Committee's report, not a scintilla of support in any condition that existed in 1902.

FIFTH.

The judgment below should be affirmed in accordance with the rule stare decisis.

In advancing this proposition it is recognized that—

> "The rule of *stare decisis,* though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Hertz v. Woodman,* 218 *U. S.* 205, 212.

The discussion must therefore be confined to the inquiry whether the reasons for the rule apply with persuasive force to the case at bar. Only one case, other than this one, involving the taxability of annuities under the Act of June 13, 1898, is to be found in the reports. Although the present case involves other features, the principle of *Disston v. McClain* (147 *Fed.* 114) would require an affirmance. In that

case application for certiorari was presented to this Court and denied on October 21, 1907 (207 *U. S.* 587), more than seven years ago. In deciding the case now at bar, the Circuit Court of Appeals for the Third Circuit said:—

> "The learned counsel for the Government, in the opening paragraph of his brief, says: 'The Government frankly concedes that on its facts, the present case falls within the decision of this court in the case of *Disston v. McClain,*' and the court below, in rendering judgment for the plaintiffs for want of sufficient affidavit of defense, makes the same statement." *R.* 34.

The tax paid in *Disston's* case was $14,926.01 and the judgment was for that sum plus $5,766.22 interest, $20,-692.23 in all (147 *Fed.* 114). Certainly only considerations of extraordinary force could induce this Court to overrule a decision rendered so long ago, which more than seven years ago was brought to its attention upon petition for certiorari and the writ denied. The statute creating the Circuit Courts of Appeals makes their decisions in such cases final unless brought here for review by certiorari. It is submitted that this did not mean that the Circuit Courts of Appeals should merely settle the law of the cases presented but, much more than that, that they should fix final rules of decision for many important classes of cases, subject only to the prompt correction of this Court, should erroneous decisions in cases of substantially first impression be brought to its attention.

Moreover, not only is the principle involved in the decision in *Disston v. McClain, supra,* applicable to the instant case but this case is, in its other aspects, on all fours with a large number of cases, long ago brought to the attention of this Court, in which the final judgments were unfavorable to the Government. This Court has denied writs of certiorari in many cases in which the estates that were relieved from the demands of the Government had no ground for such relief that does not exist in favor of these respondents. Such cases include the following:

7r

Parties.	References.		Amount of judgment.		
	Circuit Court of Appeals.	Supreme Court.	Principal.	Interest.	Total.
Eidman v. Lewisohn.....	177 Fed. 1002	218 U. S. 678	$112,816.50	$32,041.73	$144,858.23
Kinney v. Conant........	166 Fed. 720	218 U. S. 677	108,061.78	37,587.49	145,649.27
United States v. Rouss...	not reported	218 U. S. 678	36,668.37	....	36,668.37
United States v. Stephenson	not reported	212 U. S. 572	432,216.96	....	432,216.96
Sanders v. Rumsey.......	169 Fed. 1022	218 U. S. 678	6,264.28	2,049.95	8,314.23
McCoach v. Bamberger...	161 Fed. 90	218 U. S. 678	1,978.17	640.02	2,618.19
Gill v. Austin...........	157 Fed. 234	218 U. S. 677	939.41	335.20	1,274.61
Gill v. Parish...........	168 Fed. 1020	218 U. S. 677	15,708.72	4,629.81	20,338.53
Eidman v. Shepard.......	not reported	218 U. S. 678	749.68	128.85	878.53
Total....................................			$715,403.87	$77,413.05	$792,816.92

THIS PAGE BOUND VERTICAL IN BOOK

All the applications for certiorari referred to in the foregoing, except in *United States v. Stephenson,* were denied on November 14, 1910, that is nearly six months after the decision in *Hertz v. Woodman, supra,* which was rendered on May 31, 1910. The fact, that this is a "class" case, belonging to a class in which interests, just as taxable as those involved in this proceeding and representing so large an aggregate as that indicated by the foregoing, must be strongly persuasive in favor of the application of the principle that those rules which have prevailed in previous cases involving identical principles should remain the rules of decision. Respondents find nothing in the facts of the present case, in any of the decisions referred to, or in the fact that the earlier cases were determined by the Circuit Courts of Appeals (and only considered here on applications for certiorari) that suggests departure from that principle in the instant case. Reference has not been made, in the foregoing, to the five cases (*Eidman v. Tilghman,* 203 *U. S.* 580; *McCoach v. Philadelphia Trust, Safe Deposit & Insurance Company,* two cases, 205 *U. S.* 539; *Norris v. McCoach,* 205 *U. S.* 539, and *United States v. Marion Trust Company,* 203 *U. S.* 594) in which this Court was evenly divided, but in all those cases judgments adverse to the Government were finally affirmed. The facts as to the *Marion Trust Company's* case do not appear to be in any of the reports but in the other four cases the taxes recovered aggregated $39,962.18, and the interest recovered aggregated $10,443.07; total, $50,405.25. The grand total of these judgments in favor of those from whom the tax was collected or claimed, including *Disston's* case, is $863,914.40. The judgment now under review is for $1,795.15.

CONCLUSION.

Upon the foregoing facts and principles, it is respectfully submitted that the judgment below should be affirmed.

E. HUNN,
Attorney for Respondents.

WALTER C. NOYES,
H. T. NEWCOMB,
Of Counsel.

(27529)

/

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 149.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, PETITIONER,

vs.

DUNDAS F. PRATT, FREDERICK A. DREER, S. HENRY NORRIS, AND WILLIAM LORE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND J. DREER, DECEASED, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

E. HUNN,
Attorney for Respondents.

WALTER C. NOYES,
H. T. NEWCOMB,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 149.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, PETITIONER,

vs.

DUNDAS F. PRATT, FREDERICK A. DREER, S. HENRY NORRIS, AND WILLIAM LORE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND J. DREER, DECEASED, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

Statement.

This supplemental brief is filed, after argument, by leave of the court, specially granted.

This cause came on to be argued in this court on January 25, 1915, about an hour after the announcement of the judg-

ment and opinion in *United States vs. Jones, Administrator* (October Term, 1914, *No. 450*). Thereupon, the Assistant Attorney General representing the petitioner, stated to the court, in effect, that he saw no way to differentiate the instant case from the case then just decided. Upon that admission, we refrained from any argument, merely pointing to what we conceive to be the substantial identity of the facts and principles involved in the two cases (*Brief for Respondents*, 1-4, 34-8), and only mentioning certain principles, in addition to those decided in *United States vs. Jones, Administrator, supra*, on which, independently considered, we believed an affirmance would be necessary (*Brief for Respondents*, 7-23 and 22-34). With the written consent of the Solicitor General, the mandate in *Jones* case, issued from this court on January 27 last. Nevertheless, counsel for petitioner, since the argument, have filed a supplemental brief, to which a few words of reply seem warranted.

ARGUMENT.

The supplemental brief on behalf of the petitioner has three obvious aspects. That is to say, it must be considered—

First. As an indirect attempt to obtain a reconsideration and reversal of the conclusion announced in United States vs. Jones, Administrator, supra, and,

Second. As an effort to distinguish the instant case from Jones' case, upon the facts, and,

Third. As an effort to answer our second proposition (Respondent's main brief, pp. 23-34), viz., that the tax in the case at bar could not have been imposed save by a lawful assessment and that there was no such assessment.

These several aspects will be considered in order.

First.

The Indirect Attempt to Obtain a Reversal of the Decision in Jones' Case, Supra.

The language of the opinion in *Jones' case, supra,* does not leave the meaning of this court at all doubtful. We quote—

> "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent nothing is to pass to them. So, in a practical sense their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was an ascertained surplus or residue to which it could attach is inferable from the taxing act as a whole and especially from the provision whereby the rate of tax was made to depend upon the value of the legacy or distributive share."

And, again, as to section 3 of the act of June 27, 1902 (32 Stat., 406):

> "Briefly stated, it deals with legacies and distributive shares upon the same plane, treats both as 'contingent' interests until they 'become absolutely vested in possession or enjoyment,' directs that the tax col-

lected upon contingent interests not so vested prior to July 1, 1902, shall be refunded, and forbids any further enforcement of the tax as respects interests remaining contingent up to that date. In other words, it recognizes that the tax was being improperly collected upon legacies and distributive shares which were not absolutely vested in possession or enjoyment; * * *."

The foregoing merely applies the principles laid down in a long line of decisions cited in our main brief, viz:

Hertz vs. Woodman, 205 U. S., 218, 219.
Vanderbilt vs. Eidman, 196 U. S., 480, 491-5, 498-9.
Cahen vs. Brewster, 203 U. S., 543, 551.
Sturges vs. United States, 117 U. S., 363.
Mason vs. Sargent, 104 U. S., 689.
Wright vs. Blakeslee, 101 U. S., 174.
Clapp vs. Mason, 94 U. S., 589.

Moreover, the conclusion in *Jones'* case, *supra*, is in accordance with the reasonable presumption that when Congress saw fit to lay a tax upon the "recipient" (*Knowlton vs. Moore*, 178 U. S., 41, 60) of a legacy or distributive share it would not demand the tax until there was something to be received, as well as with the English cases (*Respondents' Main Brief*, 14-5).

Yet, referring to the decision in Jones' case, *supra*, counsel for petitioner characterize it as containing "general langauge" that is a "departure" from something which they contend can be found in earlier decisions and suggest that it should be "limited" and can be "upheld" in a very narrow sense only, and assert that the judgment "ought not to rest upon the ground" stated in the opinion (*Petitioner's Supplemental Brief*, 10). Moreover, the repeated insistence (*Petitioner's Supplemental Brief*, 4, 5, 9, 11, 15) upon other tests than that the interest shall "become absolutely vested in possession or enjoyment" is directly opposed to the terms

as well as to the principle of the decision in *Jones'* case. Thus, petitioner's counsel assert that—

> "The test is whether there is any condition in the gift, the event of which, if adverse, may prevent it from becoming a gift." *Petitioner's Supplemental Brief*, 5.

Obviously such a theory as that indicated by this extract can find no support, but only complete refutation, in a case which dealt with distributive shares arising out of the estate of an intestate decedent and held them free of the tax. And *Jones' case, supra*, was of that character.

We submit that the conclusion in *Jones'* case, *supra*, ought not to be reversed.

Second.

The Effort to Distinguish the Instant Case from Jones' Case, Supra.

One suggestion to be considered under this heading is that the principle of *Jones'* case applies only when letters of administration did not issue prior to July 1, 1902 (*Petitioner's Supplemental Brief*, 10). But this court held, in the opinion by Mr. Justice Van Devanter, that the act of June 27, 1902, meant that no tax should "be assessed or imposed*"—

> "* * * until in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid." *United States vs. Jones, Administrator, decided on January 25, 1915.*

Another suggestion relates to the two smaller annuities (*R., p.* 19) only, and is expressed as follows:

> "While the first annuity payment was to be made August 24, 1902, it was a quarterly payment, made

* The words of the statute, 32 *Stat.*, 406, 407.

at the end, rather than at the beginning, of the quarter beginning at the testator's death." *Petitioner's Supplemental Brief*, 3.

This date of the first payment was thus subsequent to July 1, 1902, the date on which the tax was repealed. Moreover, these annuitants were, by the terms of the will, expressly denied any value that might repose in a privilege of anticipation (*R.*, 19; *Respondents' Main Brief*, 2-3). And the words of the decision in *Jones'* case, *supra*, of course, apply here, that is, it might truly have been said, on July 1, 1902, as to this estate and these annuitants—

> "If the estate proves insolvent nothing is to pass to them."

But petitioner's counsel incorrectly assume that the quarterly payments of such annuities are payments for quarterly periods. They are not payments for such periods, either past or prospective. The rights of such annuitants are not rights to receive rents or interest or the income of a fund, but rights to specific payments on specific dates. They are not apportionable:

> "The general rule both of law and equity is, that where an annuity whether created *inter vivos* or by will, is payable on fixed days during life, and the annuitant dies before the day, the personal representative is not entitled to a proportionate part of the annuity. * * * It results in the general rule, that if the annuitant dies before or even on the day of payment, his representatives can claim no portion of the annuity for the current year." 2 *R. C. L.*, 11.

> "In the case of annuities there is no earning of interest upon anything. They are fixed sums, payable at stated days, and until those days arrive there is nothing earned and there is nothing due." 2 *R. C. L.*, 12.

The rule indicated by the foregoing extracts prevails in Pennsylvania:

Wilson's Appeal, 108 Pa., 344, 347.
Blight vs. Blight, 51 Pa., 420, 425.
McKeen's Appeal, 42 Pa. 479, 484.

Hence, if these annuitants had died prior to August 24, 1902, nothing would have passed to their estates on account of the payments provided to be made on that date. This places them in the precise situation that was held in *Sturges vs. United States*, 117 U. S., 363 (*Respondents' Main Brief*, 8, 12, 13, 23), to relieve from the similar Civil War tax.

These annuities not only would not have been paid at all if the estate had turned out to be insolvent, but they were subject to abatement if the surplus over debts proved insufficient fully to meet the general legacies:

2 *R. C. L.*, 9.
40 *Cyc.*, 1911.
Pennsylvania University's Appeal, 97 Pa., 187.
Baum's Estate, 15 Montg. Co. (Pa.) Rep., 58.

The two larger annuities in the instant case were charged upon the residuary estate (*R.*, 20-1), and these annuitants, also, were expressly denied all anticipatory rights and values (*R.*, 20-1). It is true that these annuities were to be paid from the income of the residuary estate "when and as received" (*R.*, 20-1), but this only made them depend upon the three-fold contingency, (*first*) that the estate should prove solvent; (*second*) that the estate should show a surplus above the amounts necessary to pay all claims and all prior legacies, and (*third*) that the residuary estate, if any, should produce a net income. All these contingencies existed on July 1, 1902, and, on the authority of *Jones'* case, *supra*, it is confidently asserted that they bring these annuities within the prohibitory clause of the act of June 27, 1902.

The effort of petitioner's counsel to find advantage (*Petitioner's Supplemental Brief*, 12, 16) in the fact that, with

quite obvious inadvertence, respondents' statement of claim asserts (*R.*, 5) that *on May* 29, 1903 (that is, *eleven months after the repeal of the tax*), the executors held for the legatees the cash value of their legacies must be unavailing for the pleading also shows (*R.*, 9) that these legacies had no ascertainable value and remained "contingent," on July 1, 1902, and even petitioner's supplemental brief admits (*p.* 5) that the creditors of this estate had "a full year after the granting of administration to present claims."

Petitioner's counsel note, as to the legacies of $10,000 each to Frederick A. Dreer and Ferdinand J. Dreer, Jr. (*R.*, 17), that—

> "* * * it was never claimed at any stage in this case that these legacies, postponed for a year as their payment was by the will, would not have been taxable had they exceeded $10,000." *Petitioner's Supplemental Brief*, 9.

Of course, legacies the payment of which was postponed to the end of a year that did not expire until after July 1, 1902, are within the rule of *Sturges vs. United States*, 117 U. S., 363, as well as that of *Jones'* case, *supra; Woodman's* case, *supra*, and *Vanderbilt's* case, *supra*. Moreover, all the reasoning of our main brief is as applicable to these legacies as though they had been specifically referred to on every page. And as they were exempt from taxation because they were below the minimum to which the law applied, it was quite unnecessary to assign any other reason.

Third.

An Assessment Necessary to Impose the Tax.

In view of the conclusion reached by this court in *Jones'* case, *supra*, we did not consider that we should be warranted in occupying the time of the court, in an oral argument of

the independent ground for an affirmance that is asserted and considered on pages 23 to 34 of our main brief. This ground is wholly independent of any point raised in *Jones' case, supra*, and petitioner's supplemental brief gives some space to its discussion (*pp.* 12-13).

> "Respondents in their brief invite attention to cases in which the law makes the assessment and correctly say that such is not the case here." *Petitioner's Supplemental Brief*, 13.

In view of the foregoing, we again call attention to the fact that "DUE PROCESS OF LAW," without which property cannot Constitutionally be taken from any citizen, *even in taxation*, knows nothing of the imposition of any tax until it has been assessed (*People vs. Weaver*, 100 U. S., 539; *Cooley on Taxation*, second edition, 352; 37 *Cyc.*, 987; 27 *Amer. & Eng. Ency. of Law*, 2d ed., 660-1, and cases cited in our main brief, pp. 24-7), and knows only two forms of assessment of *ad valorem* taxes, viz: (*first*) by the legislature itself, which is permissible when the tax although *ad valorem* in form is really specific in its substantial character, and (*second*) by *quasi*-judicial inquiry by ministerial officers which is required in every case in which the value to which the rate is to be applied is not so certain as to be beyond reasonable controversy and to require no evidence for its determination (*Hagar vs. Reclamation District*, 111 U. S., 701; *State vs. Clement National Bank*, 84 Vt., 167, 182, and authorities cited in our main brief, pp. 27-31).

> "This doctrine is as old as the law of taxation, and is the one proposition on which all courts and writers are agreed. It is upheld by all courts, State and Federal, as that without which there cannot be a valid charge for a tax." 27 *Amer. & Eng. Ency. of Law*, 2d ed., 660-1.

No such assessment as that suggested by counsel for petitioner (*Petitioner's Supplemental Brief*, 6) is known to the

Constitution or to the act of June 13, 1898, and amendments. Section 31 of that act and section 3182 of the Revised Statutes provide quite a different method, and that method the Commissioner of Internal Revenue attempted to apply in this case (*R.*, 9), but when he did so it was too late for any lawful assessment. The listing or scheduling of legacies, provided for in section 30, of the act of June 13, 1898, could not, in any event, constitute an assessment:

Cooley on Taxation, 3d ed., 597, 613-5.
Vicksburg Bank vs. Adams, 74 Miss., 179, 195.
Oregon & Washington Mortgage Savings Bank vs. Jordan, 16 Oreg., 113, 115.

But even if such listing might constitute a lawful assessment in any case, it could not do so in this case because no list was filed with the petitioner until May 29, 1903 (*R.*, 5, 8), that is until after the repeal of everything which permitted any lawful assessment.

The judgment below should be affirmed.

Respectfully submitted,

E. HUNN,
Attorney for Respondents.

WALTER C. NOYES,
H. T. NEWCOMB,
Of Counsel.